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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL KIDD; JUDY KIDD,	)	No. 92-15657
	)	
Plaintiffs-Appellants,	)	D.C. No. CV-S-91-00523-HDM(R)
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	
	)	No. 92-16455
	)	
DEL KIDD; JUDY KIDD,	)	D.C. No. CV-S-91-00523-hdm
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	

* This disposition is not appropriate for publication and may not be cited to or by the courts for this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted September 20, 1993*

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

In No. 92-15657, Del and Judy Kidd appeal pro se the district court's orders (1) dismissing their action for damages for lack of subject-matter jurisdiction; and (2) denying their request for leave to file an amended complaint. In No. 92-16455, the Kidds appeal the district court's order denying their motion for discovery pending appeal. We have jurisdiction to review these orders pursuant to 28 U.S.C. § 1291. We affirm.

I.

No. 92-15657

A. Dismissal for Lack of Subject-Matter Jurisdiction

We review de novo the district court's dismissal for lack of subject-matter jurisdiction. Rivera v. United States, 924 F.2d 948, 950 (9th Cir. 1991).

Del Kidd is an employee of the federal Bureau of Reclamation, an agency of the United States Department of the Interior. On July 12, 1991, the Kidds filed a complaint in the federal district court for the District of Nevada, naming the United States, the Bureau, the Department, and unnamed employees of those agencies as defendants. The Kidds allege numerous wrongful actions taken by various employees of the Bureau and Department, including Del's supervisors, against Del during the course of his employment. The Kidds first attempted to obtain redress for these alleged actions through the grievance procedures prescribed by the Civil Service Reform Act of 1978 ("CSRA"). Unsatisfied with the results and convinced that Del's grievances were mishandled, the Kidds filed the instant action.

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34..4. We therefore deny the Kidds' request for oral argument.

In their complaint, the Kidds alleged subject-matter jurisdiction under the federal question statute, 28 U.S.C. § 1331, and 28 U.S.C. § 1346(b) and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80. They alleged constitutional and common-law tort claims for (1) defamation, (2) negligence, (3) deprivation of due process, (4) intentional infliction of emotional distress, (5) abuse of authority, and (6) civil conspiracy.

In Rivera, this court held that the CSRA provides the exclusive remedy for federal civil service employees who allege claims arising out of their employment. 924 F. 2d at 951-52. Thus, the district court correctly dismissed the Kidds' action to the extent they sought to allege claims under the FTCA. See id. (holding plaintiffs' FTCA claims were barred by CSRA).

In Saul v. United States, this court held that the CSRA precludes constitutional tort claims against individual defendants brought under Bivens v. Six Unknown Named Agents of Fed. Narcotics Bureau, 403 U.S. 388 (1970). 928 F.2d 829, 835-40 (9th Cir. 1991). The court held that a Bivens claim is precluded whether or not the CSRA provides a remedy for the particular alleged wrong. 928 F.2d at 835-40. The court also held that the CSRA preempts common-law tort claims. Id. at 840-43. Relying on Saul, the district court dismissed the Kidds' action.

The Kidds contend that this case is distinguishable from Saul. We disagree. It is true that the plaintiff in Saul failed to seek redress under the CSRA before filing his district court action. See 928 F.2d at 833. Nevertheless, the Kidds' pursuit of remedies under the CSRA is irrelevant. As we stated above, the CSRA would preclude their claims even if they did not have a remedy under that statute. See id. at 835-40. Thus, the Kidds' pursuit of their administrative remedies is not a distinguishing factor.

The Kidds also contend that their case is distinguishable because their claims arise not out of 'ordinary job-related circumstances," but rather, out of the "mishandling" of Del's grievances. This contention lacks merit. First, some of their allegations (those relating to the letter of warning, the transfer and

suspension, and the harassment) are job-related.[1] Thus, any claims based on these allegations are barred by the CSRA. See Saul, 928 F.2d at 835-43. Second, even if Del's grievances were somehow mishandled, the CSRA provides a remedy -- administrative review by the Merit Systems Protection Board and a subsequent appeal, if any, to the Federal Circuit. See 5 U.S.C. §§ 1204(a) & 7703(b)(1).

We thus conclude that the district court did not err by dismissing the Kidds' action for lack of subject-matter jurisdiction. See Saul, 928 F.2d at 835-43; Rivera, 924 F.2d at 951-52.[2]

B. Denial of Leave to File Amended Complaint

We review the district court's denial of leave to file an amended complaint for abuse of discretion. Saul, 928 F.2d at 843.

[1] The Kidds also raise an issue as to whether Del ;should be considered a "whistleblower" entitled to protection under 5 U.S.C. § 2302(b)(8). See Saul, 928 F.2d at 834 n.8. We need not decide that issue here because even if Del were accorded such status, he must first resort to the Office of Special Counsel or Merit Systems Protection Board for relief. See 5 U.S.C. § 1221.

[2] We reject the Kidds' contention that the district court should have held an evidentiary hearing before dismissing their action. In support of their contention, the Kidds argue that the government's motion to dismiss is actually for failure to state a claim for relief and that, under Haines v. Kerner, 404 U.S. 519 (1972), they, as pro se litigants, were entitled to offer proof to support their claims. However, the government's motion to dismiss clearly, and properly, challenged the district court's subject-matter jurisdiction. The district court properly dismissed on that basis. Even construing the Kidds' pleadings liberally, as we must under Haines, id. at 520-21, we can discern no allegation that would serve as a basis for subject-matter jurisdiction in the district court. Thus, there was no reason for the district court to allow the Kidds to proffer evidence to support their claims.

The Kidds sought to file an emended complaint to state a Bivens claim against various individual defendants. Because the government had only filed a motion to dismiss, the Kidds still had a right to amend their complaint. Miles v. Department of the Army, 881 F.2d 777, 781 (9th Cir. 1989). Nevertheless, the district court correctly determined that amendment would have been futile because the CSRA precludes Bivens claims. See Saul, 928 F.2d at 835-40. Therefore, reversal of the district court's denial of leave to amend is not warranted.

II

No. 92-16455

We review the district court's denial of the Kidds' Fed. R. Civ. P. 27(b) discovery request for abuse of discretion. See Campbell v. Blodgett, 928 F.2d 1356, 1358 (9th Cit. 1993). "[W]e will not reverse absent a definite and firm conviction that the district court has committed a clear error of judgement." Id.

Rule 27(b) provides, in pertinent part, that "[i]f an appeal has been taken from a judgement of the district court . . ., the district court in which the judgement was rendered may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court." Fed. R. Civ. P. 27(b). The district court may allow depositions to be taken pursuant to Rule 27(b), and also Rules 34 and 35, if the court finds that "the perpetuation of the testimony is proper to avoid a failure or delay of justice." Id. Campbell, 928 F.2d at 1358.

The district court denied the Kidds' motion on the grounds they failed to satisfy the criteria set forth in Rule 27(b). In light of our decision to affirm the dismissal of the Kidds' action, we conclude that the district court did not err.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DEL and JUDY KIDD,	)	CV-S-91-523-HDM(RJJ)
Plaintiffs,	)	
v.	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This matter comes before the Court on the United States' Motion to Dismiss. The Court has considered Plaintiffs' Opposition and the United States' Reply in Support of the Motion to Dismiss. The Court has also considered the arguments made by the parties during the telephonic hearing conducted on January 28, 1992.

Plaintiffs' Complaint alleges a constitutional tort claim and several common law tort claims against the United States of America. All of the claims arise out of Plaintiff, Del Kidd's employment with the Bureau of Reclamation. Plaintiffs have sought to redress their complaints under the Civil Service Reform Act of 1978 and continue to pursue at least some of those avenues of redress.

The disposition of this case is controlled by Saul V. United States, 928 F.2d 829 (9th Cir. 1991), and Rivera v. United States, 924 F.2d 948 (9th Cir. 1991). In Saul, the Ninth Circuit Court of Appeals held that federal employees' employment-related common law tort claims are precluded by the Civil Service Reform Act of 1978. Id. at 843. In Rivera, the Ninth Circuit Court of Appeals held that the United States has not waived its sovereign immunity for constitutional tort claims and district courts have no subject matter jurisdiction to hear such claims. Id. at 951. Accordingly, Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction.

At oral argument, Plaintiffs contended that their case could be distinguished from Saul because, unlike Saul, Plaintiffs have sought to redress their grievances under the Civil Service Reform Act but have been thwarted in their efforts by agency conspiracy, collusion and bias. Whether or not a plaintiff has sought remedies under the Civil Service Reform Act is not the controlling factor. In Saul, the Ninth Circuit Court of Appeals held that even where a federal employee had no remedy under the Civil Service Reform Act, common law tort claims would be precluded because Congress had so occupied the filed of federal employee/employer relations to preempt state common law remedies. Id. at 843. Thus, it makes no difference whether an employee has or has not sought remedies under the Civil Service Reform Act before filing a complaint in federal district court. In addition, the Civil Service Reform Act provides a mechanism for reviewing these types of complaints and Plaintiffs have sought that review but were not successful on those issues.

In their opposition to the motion to dismiss, Plaintiffs request leave to amend their complaint to assert Bivens[1] claims against some of Mr. Kidd's supervisors. Again, the disposition of this issue is controlled by Saul. There, the Ninth Circuit Court of Appeals held that the Civil Service Reform Act precludes Bivens claims against a federal employees supervisors. Id. at 840. Thus, allowing Plaintiffs to amend their Complaint would be futile. An amendment would not cure any of the defects in the Plaintiffs' Complaint nor is there any recognized cause of action against Mr. Kidd's supervisors. Accordingly,

[1] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the United States Supreme Court created a damages remedy in which individuals could, under limited circumstances, sue federal officers for a violation of constitutional rights.

IT IS HEREBY ORDERED that the United States' Motion to Dismiss is granted.

IT IS HEREBY ORDERED that Plaintiffs' request to amend their Complaint is denied.

DATED this 15th day of February, 1992.

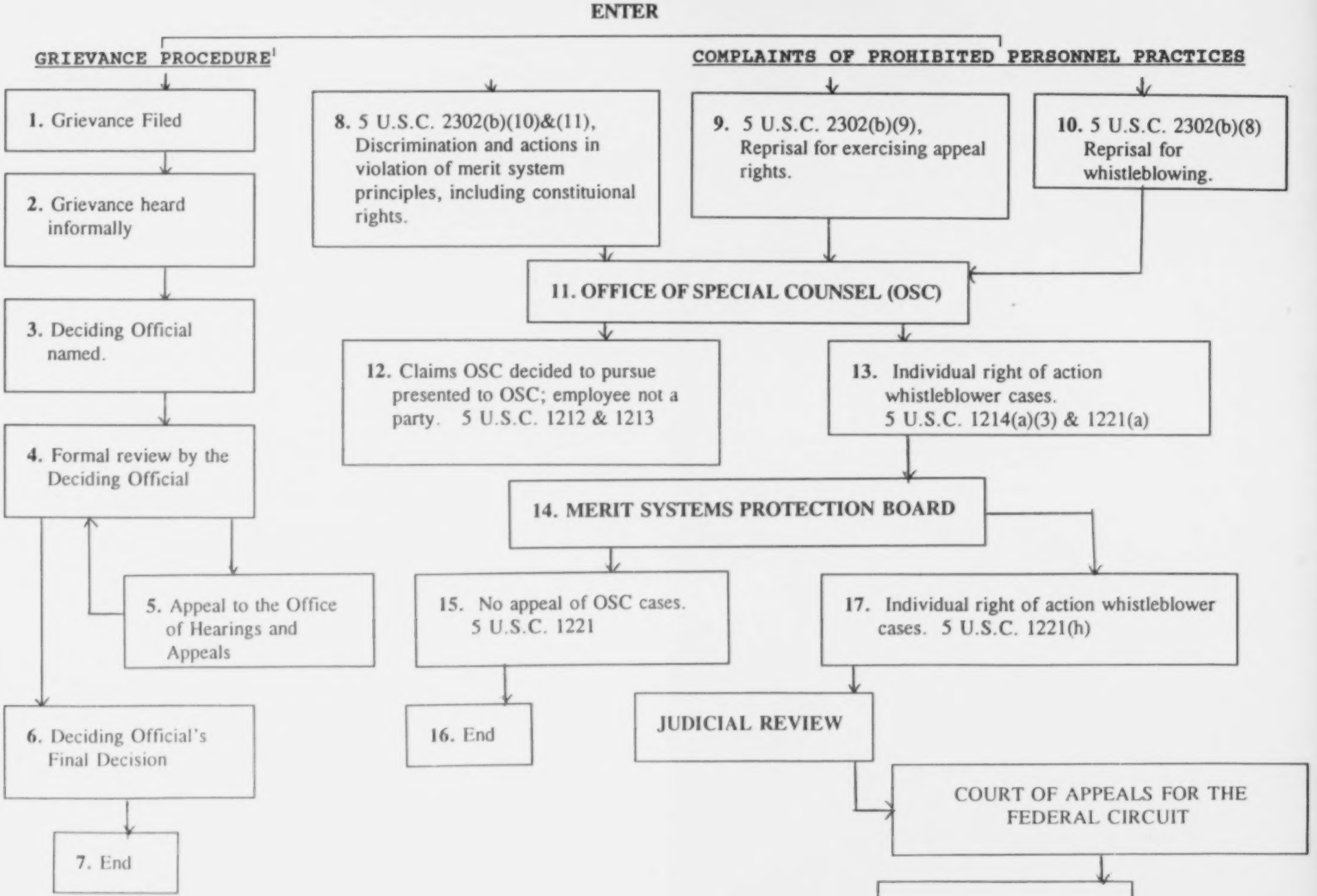
_____
UNITED STATES DISTRICT JUDGE

Submitted by:

LELAND E. LUTFY
United States Attorney

BLAINE T. WELSH
Assistant United States Attorney

ADMINISTRATIVE PROCEDURES AND JUDICIAL REVIEW AS ESTABLISHED BY THE CIVIL SERVICE REFORM ACT, AS AMENDED


ENTER
GRIEVANCE PROCEDURE[1]
COMPLAINTS OF PROHIBITED PERSONNEL PRACTICES
1. Grievance Filed
2. Grievance heard informally
3. Deciding Official named.
4. Formal review by the Deciding Official
5. Appeal to the Office of Hearings and Appeals
6. Deciding Official's Final Decision
7. End
8. 5 U.S.C. 2302(b)(10)&(11), Discrimination and actions in violation of merit system principles, including constituional rights.
9. 5 U.S.C. 2302(b)(9), Reprisal for exercising appeal rights.
10. 5 U.S.C. 2302(b)(8) Reprisal for whistleblowing.
11. OFFICE OF SPECIAL COUNSEL (OSC)
12. Claims OSC decided to pursue presented to OSC; employee not a party. 5 U.S.C. 1212 & 1213
13. Individual right of action whistleblower cases. 5 U.S.C. 1214(a)(3) & 1221(a)
14. MERIT SYSTEMS PROTECTION BOARD
15. No appeal of OSC cases. 5 U.S.C. 1221
16. End
17. Individual right of action whistleblower cases. 5 U.S.C. 1221(h)
JUDICIAL REVIEW
COURT OF APPEALS FOR THE FEDERAL CIRCUIT
SUPREME COURT

[1] Interior Grievance Procedures (370DM771.3) were established in accordance with the standards governing agency grievance procedures issued by the Office of Personnel Management, an office created by the CSRA (5 U.S.C.1001)